Filed 3/19/19 P. v. Mitchell CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KORVELL LAKEITH MITCHELL, Defendant and Appellant.	A147907 (Marin County Super. Ct. No. SC188195A)

Defendant Korvell Lakeith Mitchell appeals his convictions for forcibly raping and forcibly digitally penetrating his 17-year-old niece (Jane Doe). A jury acquitted defendant on all charges arising from an alleged sexual assault of Doe in December 2013, but found him guilty on charges arising from events on a night in March 2014. It did so after the trial court denied defendant's motion under Evidence Code[1] section 782 for leave to offer evidence that he had threatened to disclose that Doe was having an affair with her mother's boyfriend, giving Doe a strong motive to falsely accuse him of rape. Assuming that section 782 applied to the proffered evidence, we conclude that under the circumstances the court abused its discretion in failing to conduct a hearing under section 782, subdivision (a)(3) and in excluding the evidence. The challenged convictions therefore must be reversed.

[1] All statutory references are to the Evidence Code unless otherwise noted.

Factual and Procedural History

Doe lived in Marin City with her mother (defendant's sister) and her mother's boyfriend. Defendant lived in San Anselmo with his wife Elizabeth (Beth) and their two children.

In August 2013, defendant hosted a party for Doe's 17th birthday and gave her some marijuana as a present. Four months later, he and Beth hosted a Christmas dinner that Doe and her mother attended. Doe testified that the event lasted four hours and that, during the party, defendant tried to rape her in a laundry room below the apartment. Defendant, Beth, and a cousin testified that the party lasted about 90 minutes, and that defendant never left the apartment and never was alone with Doe.

On March 8, 2014, finding herself stranded in Vallejo with a friend, Doe called defendant, asking for a ride back to Marin County. He and Beth brought Doe and her friend to their apartment and the four spent the night playing dominoes, smoking marijuana, and drinking. Doe's friend fell asleep on a living room sofa; Doe lay down on another sofa; and defendant and Beth went to their room. It is undisputed that defendant later left the bedroom and that he and Doe then had sex. It is disputed whether he or she initiated the sexual conduct.

Doe testified that she heard defendant and Beth argue and that defendant then came into the living room and sat next to her on the couch to watch TV. He began touching her leg, and she pushed his hand away and asked him to stop. He then unbuttoned her pants and touched her vaginal area over her underwear. Doe testified at first that defendant did not digitally penetrate her vagina, but after the prosecutor reminded her of her contrary testimony in the preliminary hearing, she claimed that defendant had inserted "probably the tip of his finger" once that night.

According to Doe, defendant then carried her to the room where his two daughters were asleep, laid her on the floor, and began removing her pants. She resisted and asked him to stop, but was too shocked to cry out. He pinned her down, had sex with her for five to ten minutes, and carried her back to the couch. She lay crying for an hour, then took a bus to her mother's workplace. Doe told her mother that defendant had raped her. They

went to a police station, and Doe filed a report and underwent a sexual-assault examination.

Doe told two officers that defendant had sexually assaulted her on 10 occasions between Christmas and the previous night (March 8–9)—each time by digital penetration until the alleged rape. Doe told one officer that defendant had raped her twice on March 9, each time in the living room. At trial, Doe changed her account: defendant tried to rape her on Christmas, and he raped her once on March 9 in the bedroom.

On March 11, the police had Doe make a pretextual call to defendant. He initially apologized for having touched her, maintaining that he had penetrated her only digitally. Later in the call he denied *any* sexual contact. When arrested that day, he denied any sexual contact with Doe. After learning that tests had confirmed the presence of his semen, defendant claimed that he and Doe had had consensual sex. At trial, he explained that he had initially lied about having had sex with Doe because he knew that his wife would divorce him if she learned the truth—which she in fact did—and he feared losing his family.

Defendant testified that after he and Beth had gone to bed on March 9, his daughter had come into their room because she could not sleep. He took her back to her room and lay down with her until she fell asleep. As he returned to his room, Doe proposed that they smoke some marijuana. As they did so, she initiated sexual contact and asked defendant if he was scared of her. He resisted her initial overtures but, when she reclined on the couch, asked him to "show me you're not scared of me," and pulled her underwear to one side, he briefly had intercourse with her. He stopped, realizing his conduct was wrongful, and went back to bed.

Beth, despite having divorced defendant, testified in his defense that they had not fought in their room that night but had simply gone to sleep until their daughter came in, as defendant had described.

Defendant filed three motions pursuant to section 782 seeking leave to attack Doe's credibility with a variety of evidence related in some way to her past sexual conduct. Defendant's first section 782 motion sought to offer evidence that Doe had

worked as a prostitute and, among many other things, that "various family members" thought she had "engaged in sexually inappropriate behavior with her mother's [boyfriend]." That evidence, defendant argued, would show Doe's "willingness to use her sexuality to control the multiple men in her social orbit." The court denied the motion except as to evidence of Doe's prostitution.

Defendant filed his second section 782 motion during trial, seeking leave to offer evidence that, in a conversation with Beth about Doe's work as a prostitute, Doe had said, "sex is power." Defendant sought to argue that Doe had initiated sex to gain power over him. The trial court denied the motion.

Later during trial,defense counsel advised the court that defendant intended to testify that on the evening of March 8 he had told Doe that the family knew of her affair with her mother's boyfriend, and that he would tell her mother if she did not end it, and that Doe reacted angrily. The court said that such testimony could be admitted only if permitted pursuant to a motion under section 782. Defendant thus filed a third section 782 motion, seeking leave to offer testimony about this exchange. The written motion and supporting memorandum sought to introduce evidence of that conversation as well as evidence of what family members believed. The memorandum explained, "The defense does not seek to introduce evidence that [Doe's] having an affair with her stepfather (although there is ample evidence that she was), but rather that the defendant counseled her against it, threatened to expose it, and the fact that [Doe's] family *believed* she was having such an affair." In arguing the motion, counsel urged that the fact that the conversation indicated Doe was having sex with her mother's boyfriend was "really irrelevant," explaining that "the point with the sexuality . . . is motivation for her to lie when my client says, 'Look you have to stop messing around with [him],' and she gets upset. That's what would motivate her to tell this lie on him."

In the alternative, defendant sought to present at least "sanitized" testimony that he had talked to Doe about an "inappropriate relationship with a family member," without mentioning its sexual nature. The prosecutor ridiculed that idea, noting that jurors would infer that what made Doe's relationship with her mother's boyfriend "inappropriate" was

sexual, and added that defendant had already testified that he talked to Doe about something that upset her.

The court denied the motion, stating that it would consume undue time to try the issue of whether Doe and her mother's boyfriend had an affair, and that the evidence could do little to impeach Doe's veracity beyond what other evidence already had shown. The court explained: "I think at its core, it really is a sexual issue. But it is so vague, uncertain, suspicion on the part of the relatives that we would be trying that issue for quite some time as to whether or not there's anything to those suspicions. I realize that your point is that this was a source of anger among many of the family, but it's still a sexual issue. And you clothed it a moment ago, I think appropriately, [defense counsel], that the impeachment or the detraction from the veracity of the alleged victim has been with many salvos: prostitution, stealing, being a big liar. But to go into whether or not she had something to do with her mother's boyfriend that upset everybody, to me, is infinitesimal compared to those things that are already before the jury." The court stated it had read defendant's first section 782 motion that was heard by a different judge, "and the reference there was that the victim had engaged in sexually provocative behavior, and I don't know what that means. But . . . the first word is 'sexual,' and that's the same thing that you're saying here with just a different dress on, in my opinion. And that's what you want to get into, because it would explain, I guess, the particular details of Mr. Mitchell's saying something that upset her. Well, I don't know what could have upset her more than having to admit that she's a prostitute. I don't know what could detract more from her believability than everything that's before her. I think this is another 782 issue. It is with regard to her sexual behavior. A minor point . . . might be motive, but I've heard nothing and I've read nothing previously in the two previous proffers that it was—that it gave her a motive to be vindictive."

The jury acquitted defendant on all counts based on the alleged attempted rape on Christmas but found him guilty of forcible rape (Pen. Code, § 261, subd. (a)(2) (count 10) and forcible digital penetration of a minor (Pen. Code, § 289, subd. (a)(1)(C) (count 6)

based on the events of March 8–9.[2] After a further trial, the jury found that defendant had suffered prior felony convictions and served prior prison terms. Defendant unsuccessfully sought a new trial based in part on the exclusion of evidence of Doe's motive to lie. The court sentenced defendant to a total prison term of 45 years 4 months.[3] Defendant timely appealed.

Discussion

Section 1103, subdivision (c)(1), part of the Rape Shield Law (Stats. 1974, ch. 569, § 2), prohibits a defendant accused of rape from introducing "opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence . . . in order to prove consent by the complaining witness." Subdivision (c)(5), however, provides that "[n]othing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782." Section 782 in turn provides a detailed procedure by which a defendant may seek leave to offer "evidence of sexual conduct of the complaining witness . . . offered to attack the credibility of the complaining witness

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[2] Defendant was also convicted of unlawful sex with a minor (Pen. Code, § 261.5, subd. (c)) (count 11), unlawful digital penetration of a minor (Pen. Code, § 289) (count 7), furnishing marijuana to a minor (Health & Saf. Code, § 11361, subd. (b)) (counts 1, 5), and of possessing marijuana when arrested (Health & Saf. Code, former § 11357, subd. (b)) (count 12). He has not appealed his convictions for those offenses, except to challenge the conviction under count 7 as a lesser included offense of the offense for which he was convicted on count 6 (which ground would also seem to apply to the conviction on count 11 as a lesser included offense of the offense for which he was convicted under count 10). Our reversal of the convictions under counts 6 and 10, *ante,* moots the challenges to the convictions under counts 7 and 11.

[3] Calculated as follows: 18 years for forcible rape (Pen. Code, § 261, subd. (a)(2)), consecutive to 16 years for forcible sexual penetration of a minor with a foreign object (Pen. Code, § 289, subd. (a)(1)(C)), two terms of 2 years 8 months each on two counts of furnishing marijuana to a minor (Health & Saf. Code, § 11361, subd. (b)), a 5-year enhancement for a serious felony committed with a prior conviction of a serious felony (Pen. Code, § 667, subd. (a)(1)), and a 1-year enhancement for a felony committed with a prior prison term (Pen. Code, § 667, subd. (b)). The court stayed defendant's sentences for unlawful sex with a minor and unlawful digital penetration of a minor pursuant to Penal Code section 654.

. . . .” (§ 782, subd. (a).) The defendant must first make an offer of proof and if the offer is sufficient the court “shall order a hearing” out of the jury’s presence at which it allows questioning of the complaining witness about the offer of proof. (§ 782, subd. (a)(3).) “At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780[4] and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.” (§ 782, subd. (a)(4).)

Because if not applied narrowly the credibility exception of section 782 may swallow the rule of section 1103(c)(1), “ ‘[g]reat care must be taken to insure that this exception to the general rule barring evidence of a complaining witness’ prior sexual conduct . . . does not impermissibly encroach upon the rule itself and become a “back door” for admitting otherwise inadmissible evidence.’ ” (*People v. Fontana* (2010) 49 Cal.4th 351, 363.) Nonetheless, “such evidence may be admissible under section 782, provided that the evidence of the complaining witness’s prior sexual conduct is relevant under section 780 and is not barred by section 352. . . . In such circumstances, ‘it is not the fact of prior sexual activity as such that is important, but something about the special circumstances under which that prior sexual activity took place that renders it important.’ ” (*Ibid.*)

Here, in large part because of defendant’s failure to have mentioned the alleged threat in his prior section 782 motions, and because his third motion included the proffer of “testimony regarding the family’s belief that [the boyfriend of Doe’s mother] and [Doe] were having an affair,” focus on the alleged threat and Doe’s asserted response to the threat was obscured. On appeal defendant does not dispute the exclusion of evidence as to whether Doe in fact was having such an affair, or the exclusion of evidence concerning the family’s beliefs. He contends the court erred in failing to conduct a

[4] Section 780 provides a non-exclusive list of matters the fact-finder may consider as having a tendency in reason to prove or disprove the truthfulness of testimony.

hearing under section 782, subdivision (a)(3) and ultimately failing to admit evidence that he threatened to tell Doe's mother of Doe's affair and that she was angered by this threat, providing a motive for her to lie. The evidence was offered to attack Doe's credibility not by making the archetypical argument that section 782 is meant to preclude—i.e., that because a complaining witness consented to sex with another person at another time, it is likely that she consented to sex with the defendant. Instead, it was offered to prove that Doe had a motive to falsely accuse defendant of rape.[5]

At the outset, it is not entirely clear that evidence of defendant's asserted threat and Doe's response comes within sections 1103, subdivision (c)(1) or 782. The evidence was not offered to prove Doe's prior sexual conduct or as propensity evidence to show that Doe consented to sex with defendant. Nonetheless, the proffered evidence necessarily made reference to Doe's asserted sexual activity with another. Particularly in view of the other evidence defendant was concurrently seeking to introduce, we assume that its introduction was properly considered under section 782.

Defendant argues that in refusing to allow evidence of his threat to Doe and her response, the trial court failed to grasp the unique impeachment value of that evidence, and eliminated "a critical and irreplaceable link in his theory of defense." We are constrained to agree. The court failed to distinguish between other evidence defendant sought to offer—evidence of the alleged affair itself and of family members' beliefs about such an affair—and evidence that defendant "counseled" Doe against such activity, and Doe's response to his threat to tell her mother if she did not. When the trial court addressed "the possibility that [the proffered testimony] may have some bearing on a motive," it stated, "I think that is so infinitesimal at this point, given the facts of this case, that it is not worth the jury's time . . . to hear all of that about the people that were around

[5] Defendant also argues that if section 782 did require exclusion of the evidence, the statute as applied denied his federal constitutional rights to confront the witnesses against him and present a complete defense. Because we shall hold otherwise with respect to the application of section 782, we need not consider defendant's constitutional claims. Nor need we consider defendant's additional argument that the trial court erroneously failed to instruct, sua sponte, on the lesser included offense of attempted forcible penetration.

her, their suspicions of, quote, sexually provocative behavior. I just don't think that the law either compels or, frankly, allows me to go down that path." The concern about unnecessarily extending the proceedings undoubtedly provided good reason for excluding evidence of whether there was such an affair and of the family's opinions on the subject, but did not justify the exclusion of evidence of the exchange between Doe and defendant. As defense counsel attempted to explain, "I don't even need those people to testify. What I need is one sentence from [defendant]: 'I told her that night if she didn't knock it off, I was going to call [her mother].' That was his sister. That's all I need. You don't even have to know what he accused her of [doing]; he can completely make it sexless. But he had a conversation with her that night; it was upsetting to her, and he would testify the reason it was upsetting is because he said, 'If you don't knock this off, I'm going to tell your mom.' That's all I need to have."

The court's reference to the proffered testimony having only an "infinitesimal" bearing on motive is also unsupported. The court went on to state that it did not believe "that under 780 there is a sufficient basis under 352 to supply *another*, I guess, supposed motive, such as vindictiveness." (Italics added.) But there was no *other* evidence of Doe's possible motive to falsely accuse defendant. There was evidence questioning Doe's credibility and, in defense of the court's ruling, the Attorney General argues that "[d]emonstrating a motive to lie . . . is merely one way to attack the credibility of a witness." But the two are not the same. Although Doe's general credibility was questioned, there was nothing before the jury to explain what would have motivated Doe to lie on that particular occasion. There is a fundamental difference between a general propensity to lie and a motive to lie in a specific instance. The distinction is reflected in section 780. In identifying matters that affect credibility, the statute separately lists "character for honesty or veracity or their opposites" *and* "[t]he existence or nonexistence of a bias, interest, or other motive." (§ 780, subds. (e), (f)).)

The exclusion of the proffered evidence, without so much as the preliminary hearing required by section 782, subdivision (a)(3) to evaluate the proposed testimony, prevented defendant from providing the jury with a potential explanation of why Doe

would initiate sexual activity and then, the following day, falsely accuse him of rape. Defendant was allowed to answer "Yes," to two questions: "Did you have a conversation with [Doe] about anything that night?" and "Did that conversation appear to upset her?" But that Doe was "upset" about some unspecified subject certainly does far less to explain a potential reason for lying than an explanation of what defendant had threatened to do that so angered her.

Moreover, the court also rejected defendant's alternative request for permission to at least provide a "sanitized" version of the exchange. While the proposed reference to Doe having an "inappropriate relationship" might well have suggested a sexual relationship, as the prosecutor argued, it had already been established that Doe had been a prostitute, so the significance of such a suggestion would have been minimal. Moreover, the court might well have explored other means of sanitizing the testimony, and in all events could have given a limiting instruction that the testimony should not be considered for the purpose of deciding whether Doe had engaged in sexual conduct with her mother's boyfriend, which was irrelevant, but only for the purpose of evaluating Doe's state of mind and her potential motive in accusing defendant of rape.

Given the significance of Doe's potential motivation for lying, the exclusion of the proffered evidence was an abuse of discretion, requiring reversal if it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Doe and defendant were the only witnesses to the conduct for which defendant was convicted. There was no way to reconcile their accounts but to conclude that one of them was being untruthful, and the court's ruling left defendant unable to present an explanation for why Doe would be motivated to lie. The jury acquitted defendant on all charges arising from the alleged attempted rape on Christmas—a verdict strongly implying that jurors did not believe Doe's testimony about that day. Had they been allowed to hear evidence that Doe had a motive to lie about the sexual conduct that undisputedly occurred on March 9, there is a reasonable probability that they would also have disbelieved her testimony about the events of that night.

Disposition

The judgment is reversed as to the convictions on counts 10 and 6 for forcible rape and forcible digital penetration. The convictions under counts 1, 5, 7, 11, and 12 are affirmed. The matter is remanded for further proceedings on counts 6 and 10 and for resentencing.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
TUCHER, J.